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Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: PYCO Industries -- Feeder Line Application --
South Plains Switching, Ltd., F.D. 34890 217353
and related proceedings F.D. 34922 and 34802 217354
217352
<u>appeal and motions for reconsideration, correction and clarification</u>

Dear Mr. Williams:

On behalf of PYCO Industries, enclosed please find an original and ten copies of a combined appeal and various motions for reconsideration, correction and clarification arising out of a series of decisions by the Board and the Director during the period August 16 to 18. PYCO has only just received certain evidence which Pioneer Railcorp evidently supplied the Director on August 16. PYCO reserves the right to comment further on that evidence once it has supplied same to its experts and completed its analysis.

Thank you for your assistance.

Very truly,

Charles H. Montange
for PYCO Industries, Inc.

Encls.

cc. counsel per certificate of service (w/encl.)
Mr. McLaren

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BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. -- FEEDER LINE DEVELOPMENT -- SOUTH PLAINS SWITCHING LTD.	)	F.D. 34890
PIONEER RAILCORP d/b/a KJRY --COMPETING FEEDER LINE APPLICATION -- SOUTH PLAINS SWITCHING LTD.	)	F.D. 34922

APPEAL FROM
ACCEPTANCE OF FEEDER LINE APPLICATION
of PIONEER RAILCORP (August 17, website August 18)[1]
AND
PETITION FOR CLARIFICATION/RECONSIDERATION OF
YET ANOTHER ROUND OF COMPETING APPLICATIONS
(August 16, website August 17)[2]
AND
MOTIONS FOR CORRECTION AND PETITION FOR CLARIFICATION
OF DECISION OF AUGUST 18
IN F.D. 34890 AND 34802

During the period August 16-18, this Board or its Director issued a trio of decisions which raise some serious procedural and substantive questions in connection with the feeder line and alternative service proceedings initiated by PYCO Industries, Inc. It is prudent to step back for a moment and ask whether aspects of these decisions should be revisited and rendered more coherent.

Background

In F.D. 34802, this Board has repeatedly found that PYCO has demonstrated that it had received inadequate rail service

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[1] This decision is inscribed as served on August 17, but it appears as a late release on August 18 on the website).

[2] This decision is inscribed as served on August 16, but it appears on the website on August 17.

from its incumbent provider, South Plains Switching, Ltd. (SAW). This Board in response authorized alternative rail service to PYCO by West Texas & Lubbock Railroad (WTL) under 49 C.F.R. Part 1146. Part 1146 relief by statute cannot last for more than 270 days. The 270th day is October 23, 2006.

Because SAW was not able or willing to correct the service deficiencies (SAW instead engaged in a combination of denial and active retaliation against PYCO), PYCO invoked the three remedies available to shippers for long term relief: PYCO filed a feeder line application (F.D. 34844); PYCO filed a Complaint (F.D. 34870); and PYCO filed a petition for alternative service under 49 C.F.R. Part 1147 (F.D. 34889). PYCO also filed a petition to rescind SAW's acquisition exemption of its lines from BNSF [F.D. 33753 (sub-no. 1)].

In a decision issued July 3, 2006, the Board prescribed an expedited schedule for consideration of PYCO's "Amended" Feeder Line Application (in F.D. 34890) to permit a new carrier to take over operations for PYCO (and at least Attebury and Compress) by October 23, the date when PYCO's alternative service order would expire. This proceeding became more complicated when Pioneer Railcorp (d/b/a Keokuk Junction Railway) sought an extension of time to file a competing application for all of SAW. This Board subsequently docketed as F.D. 34922 a "competing application" of Pioneer not for all of SAW but for a portion that will not result in adequate service to shippers.

Nonetheless, at least until August 16, the Board appeared to be endeavoring to get a decision out in time to protect PYCO and other shippers effective October 23.

However, in the three decisions served August 16-18 listed above, the Board called into question this resolve through a series of rulings which taken together not only preclude Board action by October 23 but also leave the procedural schedule essentially up to the discretion of SAW.

The effect of certain aspects of the three decisions is unnecessarily or unfairly prejudicial to PYCO and should be revised. In addition, other and related aspects of the decisions embody results which PYCO believes are unlawful. For this reason, we make this appeal and related motions for reconsideration, correction and clarification.

I.

Appeal from Director Decision and Motion to Reconsider August 16 Board Decision

A.

Point for Reconsideration

The Board's decision served August 16 allows Pioneer Railcorp (d/b/a Keokuk Junction Railway)[3] to file a valuation case for all-SAW by August 28 if the Director "accepts" Pioneer's application on "Alternative Two" on August 18. This aspect of the decision is unlawful, and prejudicial to PYCO and the shippers, in that it is contrary to the requirement that Pioneer show financial responsibility for the all-SAW

[3] PYCO will refer to Keokuk Junction Railway and Pioneer Railcorp herein as "Pioneer."

alternative.

The Director in a decision inscribed as served August 17 (but appearing on the website on August 18) purports to accept the Pioneer application as to Alternative Two. Given the decision of August 16, this appears to mean that Pioneer does not have to show financial responsibility for an all-SAW alternative.[4] Since Pioneer does not have financial responsibility for all-SAW, this violates 49 U.S.C. § 10907. The August 16 decision must to that extent be reconsidered.

B.

<u>Points for Appeal</u>

But the Director's decision of August 17 is itself flawed, and this Board should reverse it on administrative appeal. While we view the Director's decision as flawed on several grounds, we will concentrate on two here. First, the Director ignores PYCO's evidence that Alternative Two as defined by Pioneer cannot be consistent with the public convenience and necessity (PCN). Second, the Director's decision insofar as it deals with financial responsibility is based on secret information that PYCO had no opportunity to review, much less comment upon. Moreover, it is inconsistent with this Board's actions in connection with PYCO's own initial showing of financial responsibility. Finally, SAW lacks financial

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[4] Pioneer in its competing filing for Alternative TWo does not even pretend that the information it supplies (secret or otherwise) shows financial responsibility on its part to acquire all of SAW.

responsibility even for Alternative Two.

1.

The Director's Decision Ignores PCN

The Director's decision is deficient in that the Director ignored PYCO's argument that Pioneer's competing application could not possibly serve the public convenience and necessity (PCN) because it would result in inadequate rail service for the shippers involved. It hardly squares with transportation policy declared in 49 U.S.C. § 10101, including but not limited to 10101(4) (sound system meeting needs of public), 10101(8) (consistency with health and safety), 10101(12) (prohibit predatory practices, unlawful discrimination, undue concentration of market power), 10101(15) (expeditious handling of proceedings) to institute an inherently defective and inadequate operation in place in Lubbock.

As PYCO explained it our motion to reject, on the basis of (1) SAW's actions subsequent to May 4 (when PYCO served our original feeder line application)[5] and (2) discovery information developed in July upon finally gaining entry for inspection, PYCO has determined that Alternative Two simply will not permit adequate rail service to its Lubbock operations.

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[5] SAW has attempted to use its ownership of the yard to block PYCO's access to its seed stockpile, and to hamstring PYCO's rail dependent operations. More of the same can be expected if SAW remains in control of any portion of the yard adjacent to PYCO facilities. Also, PYCO's experts (after the inspection authorized by this Board this past July) have indicated that PYCO needs control of the entire yard in order to rehabilitate and maintain it in an effective and cost-efficient manner.

PYCO is no longer pursuing Alternative Two as originally set forth by Pioneer (PYCO has indicated that as a minimum Alternative Two must be modified to encompass essentially the whole of the SAW yard).[6] PYCO's evidence of Alternative Two inadequacy is not contradicted in the record (indeed, SAW and Pioneer has earlier opposed Alternative Two as "cherry picking"). If Alternative Two will not result in adequate rail service, a competing feeder line application for it should not have been accepted; it should have been dismissed. Accepting a "competing" application for something that does not work is equivalent to accepting an application for a railroad to nowhere that will not and cannot serve shippers. It is like multiplying the number zero. Besides making no sense, it is doubtful it is even constitutional, since the Fourth Amendment allows takings of property by the federal government only for a public purpose, and creation of non-functional railroads is hardly a bona fide public purpose.

49 U.S.C. § 10907 was unquestionably designed by Congress as a remedy for inadequate service. It was intended to allow shippers or their surrogates to ensure adequate service, not to have continued inadequate service thrust upon shippers. It is arbitrary and unreasonable to twist the statute into some kind of musical chairs for inadequate rail providers at shipper expense.

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[6] SAW has moved to reject this "modification" to Alternative Two.

The feeder line statute was offered as a floor amendment by Congressman Madigan on the day the House adopted its version of the Staggers Act.[7] Congressman Madigan explained that the feeder line statute was designed as a remedy for "slow motion abandonments" in which a railroad allows its service to deteriorate or fails to provide proper maintenance or service to the point where enough customers drop off the line or go out of business so that the railroad can obtain outright abandonment authorization.[8] Congressman Madigan explained that under his program,

> "a railroad providing inadequate service to a shipper on a branch line can lose his operating rights in that territory through a Commission proceeding. Whenever a shipper, a group of shippers, or a governmental entity finds that service is inadequate on a branch line, they may decide to take over the operation of the line themselves."

126 Cong. Rec. 24840-41. Congressman Madigan indicated that the intent of his amendment was "to put some teeth into the

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[7] The Senate's bill did not contain a feeder line provision (although it did contain language that was the precursor to the OFA statute). The House version as reported by committee did not contain an OFA provision, but did include, as section 502, a feeder railroad development provision applicable upon abandonment. It would have required sale of lines approved for abandonment at net liquidation value, and that a carrier intending to abandon a line to attempt to find a potential purchaser. See H. Report 96-1035, 96th Cong., 2d Sess. pp. 2-23 (language of bill) & p. 71 (explanation) (May 16, 1980). This language was entirely supplanted by Congressman Madigan's amendment, discussed in the text.

[8] 126 Cong. Rec. 21840 (Sept. 9, 1980).

traditional requirement that a railroad has a responsibility as a common carrier to provide adequate service." 126 Cong. Rec. 24841. He indicated that his amendment was intended to allow transfer of a line if it is scheduled for abandonment or if service on it is inadequate. The idea was to save lines "prior to total deterioration of service." 126 Cong. Rec. 24867. Nothing in the legislative history indicates that Congress intended to allow a line to be transferred to a new entity merely for continuation of inadequate service.

It is error for the Director, or for the Board, to construe 49 U.S.C. § 10907 to permit a feeder line application that will result in inadequate rail service just because a shortline operator without an iota of shipper support proposes it. The Board on appeal should dismiss the Pioneer application. The Board should not allow Pioneer to bootstrap itself into this proceeding by filing a feeder line application for something that will not work. To use an old idiom, Pioneers application is a dog that will not hunt.

2.

Pioneer's Secret Financial Information

PYCO timely objected on August 14 to Pioneer's application as failing to show financial responsibility. PYCO noted that all Pioneer had done is file a letter from a banker saying Pioneer has a line of credit something less than $2 million and Pioneer's representation it has some cash of roughly similar amount. This was less of a showing for less financial responsibility than the Director and the Board found deficient on the part of PYCO in F.D. 34844 (PYCO in F.D. 34844 showed it had no less than $5 million available). Pioneer says it operates a host of shortlines in numerous locations, and presumably needs all its cash to keep them afloat. The question in terms of financial responsibility is whether Pioneer has money to operate what it has, <u>plus</u> buy a line under the feeder statute and operate it.

Since PYCO's August 16 response was merely mailed to PYCO's counsel, PYCO did not even receive it until Saturday, August 19, two days after the Director had acted on the Pioneer application based on secret information not available for PYCO's prior review and comment. To make matters worse, the "evidence" on which the Director relied was omitted from the material mailed PYCO, because Pioneer had marked it for secret treatment under the protective order.[9] PYCO's counsel did not receive that information until Tuesday, August 22.[10]

On the same day that the Director's decision appeared on the STB website, the Board extended all procedural deadlines by at least 30 days or evidently for such additional time as SAW decides to take to file its valuation case. This means that there was no justification for the Director to take what

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[9] PYCO was forced to submit its equivalent information in public form.

[10] We have not had time to evaluate this secret evidence fully, but initially it appears to indicate that Pioneer is not capable of providing adequate rail service.

amounted to <u>ex parte</u> action on the basis of Pioneer's late-filed and secret information. There is no reason to presume financial responsibility on the part of Pioneer. The Director's action deprives PYCO of a fair and reasonable opportunity to be heard. The new evidence tendered by Pioneer should be stricken from the record, and Alternative Two evaluated solely on the basis of Pioneer's application.

For the reasons PYCO stated in its motion to reject, SAW's original application fails to show financial responsibility for Alternative Two. It certainly shows that Pioneer lacks the resources to operate its other rail lines and buy even the "Alternative Two" portion of SAW, much less provide for any rehabilitation. Indeed, Pioneer admits that rehabilitation would render the SAW lines economically non-viable and thus unattractive to Pioneer. But this is not an argument in favor of ignoring the cost to rehabilitate; it instead is an admission by Pioneer that it seeks to acquire the assets to milk them further and to run these lines further into the ground. But the rails are essentially sitting on the ground already on many portions of SAW's system. If they much deeper, BNSF will have to put the loads onto trucks for the switch. That brings us back to our first objection to Pioneer: Pioneer by belittling rehabilitation on the ground that it cannot operate the lines at a profit if it so takes care of them is admitting that it is proposing to provide yet more inadequate service to shippers, just as they have been experiencing under SAW.

The Director and this Board cannot brush this off as irrelevant unless the Director and the Board wish to dismiss 49 U.S.C. § 10907 as a viable shipper remedy.

3.

No More Pioneer

Since Pioneer's "competing" application is deficient, it is out of the proceeding.

II.

Procedural Issues

On August 18, the Board issued a decision extending all deadlines by 30 days. Based on the decisions of August 16 and August 17, the effect of the August 18 decision is to extend the "deadlines" as follows:

-- SAW's valuation case for all SAW: no earlier than September 18 or at whatever later date SAW files its valuation case;

-- SAW's discovery response for all SAW: three days later [i.e., September 20 (or three days after SAW files its valuation case, whenever that may be);

-- PYCO's amended valuations, if any, for all SAW based on SAW discovery responses: 7 days after SAW's discovery response [i.e., September 27 (or whatever later date depending on SAW's valuation filing date);

-- Pioneer's valuation case for all SAW: September 28 (or whatever later date depending on SAW's valuation filing date);

-- competing applications for all SAW: October 6 or whatever later date depending on SAW's valuation filing date[11];

-- responses to PYCO amendments (if any) and to Pioneer

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[11] The Federal Register dated August 26 lists September 6. Thus we have yet more confusion.

> filings: October 11 or whatever later date applies depending on when SAW gets around to filing a valuation case.

If competing applications are filed on October 6 or whatever later date it ends up being (<u>but see</u> note 3), then obviously this procedural schedule must be further amended.

The above procedural schedule in effect places no deadlines on SAW, and puts SAW in control of all the deadlines for other parties. Moreover, it appears inconsistent with the Federal Register of August 22. PYCO objects.

A.

Motion to Adopt Definite Date for SAW to File its Valuation, <u>and Motion to Move Up SAW's Discovery Response</u>

The schedule embodied above is unduly and unfairly prejudicial to PYCO and to shippers. The Board has given SAW an indefinite period (30 days or such longer period as SAW in its discretion takes without limitation) to file a case, yet PYCO is afforded one week to respond. All other deadlines in the schedule are contingent upon when SAW decides in its discretion to file its valuation case. This raises two problems: it leaves the time schedule for this proceeding in the discretion of SAW (and threatens to prolong unnecessarily what was formerly an expedited proceeding), and it affords PYCO an insufficient period to amend its valuations based on responses by SAW to PYCO's discovery requests which SAW has had before it now for over three months.[12]

The first problem is easily corrected. The Board should provide that SAW has only until September 18 to file its case. That is a 30 day extension. To obtain its extension, SAW represented that its rail "expert," (Mr. Landreth) is constructing a bridge in Arizona for at least a month. But if he cannot spare even a couple days in that time for SAW, then SAW should hire another person to testify as to its rail.[13] In all events, the Board should give the parties a date upon which they can rely. Rail policy calls for fair and expeditious proceedings; not deadlines at the discretion of incumbent railroads that have been repeatedly found to have provided inadequate rail service. PYCO and other shippers, subject as they are to a railroad with a retaliatory reputation, should not be left totally at sea as to when SAW will file its case. The Board should set and enforce deadlines against SAW, and for that matter against its brother in arms Pioneer as well. SAW, after all, represented to this Board it would file its valuation case for all SAW on August 18.

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[12] Although PYCO wishes to progress this proceeding quickly and is prepared itself to move quickly, one week is too fast. PYCO's discovery as to all SAW (to which SAW has not yet responded) seeks information on SAW's sales of property. Once this information is supplied, PYCO must supply it to experts to ascertain areas involved and then to PYCO's appraiser for a calculation of the impact on net liquidation value (NLV). This cannot be done in one week.

[13] PYCO's position was and remains that SAW has not demonstrated any reasonable grounds for an extension of time. SAW represented to this Board that it would file on August 18 and instead on August 18 moved for an indefinite extension.

The second problem -- PYCO's time to digest SAW's discovery response -- can also be readily solved: the Board should require SAW to respond immediately to PYCO's discovery (SAW has had it for over three months) and afford PYCO a month from that date to file amended valuations.

Moreover, SAW in its motion provides no reason for delay of its discovery response at all. SAW's discovery response, which was due on August 21, should be served no later than August 28. This would give PYCO adequate time to consult with its experts to determine whether any valuation adjustment is required by September 27.

B.

Motion to reconsider second round of FLA's

Per its order of July 3 in F.D. 34890, the Board originally required all competing feeder line applications to be filed by July 18. Although no outside party requested it,[14] the Board in its order of August 16 opened the proceeding up for yet another round of competing applications to be filed either September 6 (per August 22 Federal Register) or October 6 or at some unknown future date (per August 18 order). PYCO objects to this unsolicited provision of a second round of feeder line applications as inconsistent with 49 U.S.C. § 10101(2) & (15) (expeditious handling of proceedings), and as unnecessary, and clearly prejudicial and unfairly taxing to shipper interests.

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[14] This is a second bite at the apple, for only Pioneer was given leave for a delayed filing on July 18.

Reconsideration of this unnecessary additional round of applications will prejudice no one for the world already had an opportunity to file an application, or as Pioneer has shown, a motion for extension, on July 18.

Omitting the superfluous second solicitation of competing feeder line applications would also assist in resolving the confusion about due dates (September 6 per August 22 Federal Register, October 6 or later per order of August 18), and the unnecessary potential to prolong the proceeding. If the Board does not omit this surplusage pursuant to this motion, the Board must at least put a clear due date upon it taking into account the confusion arising from the Federal Register and the August 18 order.

C.

Comments on "tolling"

In all events, it is clear under the August 18 schedule that the feeder line proceeding cannot be completed by October 23. This raises the question of what protects PYCO against retaliation and inadequate rail service by SAW after October 23.

Per 49 U.S.C. § 11123, alternative rail service under 49 C.F.R. Part 1146 may not extend for more than 270 days. In his letter of August 16, SAW's counsel proposed to "toll" the statutory 270 day limit by the additional period SAW takes to file its valuation case (which SAW says is no less than 30 days but may be more). The Board in its August 18 order seemed to adopt that approach. It provides for tolling for "30 days or until SAW files its valuation evidence."

Under 49 U.S.C. § 11123, Congress limited Part 1146 relief to 270 days. Although Congress has afforded STB broad exemption authority under 49 U.S.C. § 10502, it is not clear that STB has authority to waive an express statutory limitation on the power of the Board to afford a shipper remedy. Neither SAW nor the Board cited any authority for waiver of a statutory limit on STB's power, nor did SAW or this Board allude to the findings required in section 10502 to exempt the Board's action from the time constraint in § 11123. Accordingly, PYCO is unsure whether service may lawfully be provided under Part 1146 subsequent to October 23. SAW lacks the authority to confer power on the Board that Congress has denied. We do not wish to be left in the lurch should SAW "change its mind" and contend that the Board's action is ultra vires.

D.

Need for Part 1147 relief

PYCO further notes that the most recent feeder line application involving Pioneer spun out two years between Pioneer's application acceptance and a final result. Unless our appeals and relevant motions are granted, this proceeding not only will be subject to the warm embrace of Pioneer, but also to another casting call for feeder line applicants. It is clearly now difficult to predict when it will conclude. It is far from clear how the kind of "tolling" the Board so far has adopted will or can protect PYCO from inadequate rail service while the feeder line process spins out its now unpredictable course.

The only way to ensure that the actions of August 16-18 do not prejudice PYCO is to grant PYCO relief under Part 1147, as PYCO has requested in F.D. 34889. According to the STB e-library, SAW filed its Reply to PYCO's petition on August 14. Per 49 C.F.R. § 1147.1(b)(3), PYCO's rebuttal is due August 29. PYCO plans to file its rebuttal on or before the due date, and the Part 1147 proceeding will then be ripe for decision.

E.

<u>Motion to clarify intent</u>

The Board's August 18 order gives SAW discretion to file a valuation case after October 23. If SAW files its valuation evidence on or after October 23, then the Board's language on its face says that the tolling lasts "until SAW files its case." This can be construed to mean, particularly in light of the statutory limit on Part 1146 relief, that the Part 1146 relief expires when SAW files its case. This obviously is highly prejudicial to PYCO. We believe that the Board means that the 270 day period shall be deemed not to accrue for however many days lapse from August 18 until SAW finally files its case, and not that alternative service authority may lapse when SAW files its case. Then, if SAW delays for 90 or 100 days or a year, the alternative service order in theory (assuming the Board is not acting <u>ultra vires</u>) extends for that period of time beyond October 23. The Board should clarify that it means that days counting toward the statutory limit of 270 will not accrue from August 18 until SAW files its all-SAW valuation case.

PYCO notes that even this kind of extension still will afford the Board and the parties only approximately 30 days, more or less, to decide the feeder line case, consummate a transaction, and institute new service in Lubbock under the Board's procedural schedule. We do not believe that this is a sufficient period of time for any entity other than PYCO and WTL (PYCO's F.D. 34802 alternative service operator) to initiate service in Lubbock. PYCO notes that Pioneer has requested 60 days from the Board's decision authorizing it to acquire to actually consummate a transaction. Based on what we have learned about Pioneer and its lack of knowledge of the SAW lines and the shippers in Lubbock to date (as we have shown, Pioneer's president told BNSF that Pioneer knew nothing of the situation in Lubbock coterminous with the filing of the very competing application that the Director accepted), Pioneer will likely need at least 60 days from the date of any decision of this Board to be able to start anything in Lubbock, much less do it adequately.

PYCO will be prejudiced if it is deprived of WTL service before a feeder line applicant is able to commence providing adequate service. In the end, this is yet another reason that the Board will need to give attention to PYCO's Part 1147 petition. The feeder line process no longer appears to be a reliable means to ensure adequate rail service in Lubbock, at least in the short term.

IV.

Conclusion

Pioneer should not be in this proceeding on the basis of an application to provide inadequate service without financial responsibility. Pioneer obviously is just fooling around; it has essentially admitted it to both PYCO's Lubbock attorney and to BNSF.

The procedural schedule

-- should delete another superfluous round of competing applications,

-- should specify when SAW must file its case on all-SAW,

-- should afford PYCO a realistic period to consider SAW's belated discovery response, and

-- should ensure PYCO's ability to receive alternative rail service in F.D. 34802 and 34889 for the duration of this feeder line proceeding.

This Board has repeatedly found that PYCO has demonstrated it has received inadequate service from SAW. A majority of shippers agree that SAW service is inadequate, and many have expressed concern in their comments to this Board about SAW retaliation for their very action in informing this Board. The inducement of an expedited proceeding was one of the reasons that they were willing to speak out, for the Board's indication it was expediting the process limited their risk.

PYCO continues to seek relief effective by October 23 in its feeder line proceeding, for itself and for the other shippers.

There is no need to strain to permit Pioneer an opportunity to provide inadequate service in Lubbock. All others who like Pioneer claim they want to explore business opportunities have had their chance. The feeder line statute is fundamentally to help shippers obtain adequate service, not litigate them to silence. The statute should be construed consistent with "expeditious handling and resolution" of this proceeding. 49 U.S.C. § 10101.

Respectfully submitted,

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<u>Certificate of Service</u>

By my signature below, I certify service upon the following counsel of record by express (next business day) by timely deposit with an express service provider on 22 August 2006:

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